United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2173

RICHARD G. BOLIO, JR. Plaintiff-Appellant

V

FORD MOTOR COMPANY Defendant-Appellee

B

Appeal from the United States District Court for the District of Vermont -- Civil Action No. 73-93

REPLY BRIEF OF

PLAINTIFF-APPELLANT

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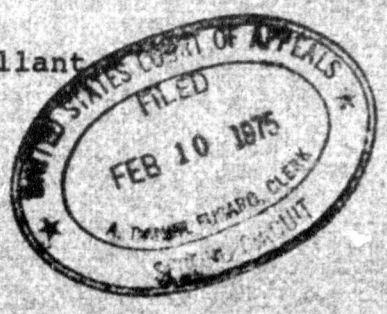

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2 Anderson, Uniform Commercial Code, § 2-719:2 at 503 (2d ed. 1971)..... 3

THE AUTHORITIES CITED IN THE APPELLEE'S BRIEF ARE EITHER IRRELEVANT TO THE CASE AT BAR OR DISTINGUISHABLE ON THE FACTS.

Even a cursory perusal of the appellee's brief shows that it has failed to persuasively respond to the arguments made in the Appellant's brief. The citation of Vermont cases, Hathaway v. Ray's Motor Sales, 127 Vt. 279, 247 A.2d 512 (1968), and Tracy v. Vinton Motors, Inc., 130 Vt. 512, 296 A.2d 269 (1972), is irrelevant to the case at bar for a number of reasons.

It appears that V.S.A. Title 9A became effective at midnight on 31 December 1966 and apparently therefore had no application to or was cited in Hathaway since the transaction in Hathaway apparently was entered into some time in July of 1966. That case involved the purchase of a mobile home from a retail dealer. The dealer disclaimed in writing all warranties, leaving the purchaser with the manufacturer's warranty. The court held that the disclaimer was valid and could not be contradicted by oral testimony, such testimony being in violation of the parol evidence rule. Appellee cites this case for the proposition that Vermont courts do not find disclaimers unconscionable.

Given the availability of the manufacturer's warranty, the Hathaway case is undoubtedly correct. Moreover, Appellant has never contended that disclaimers, in general,

are unconscionable. Indeed, the Code expressly provides for them. V.S.A. tit. 9A §§ 2-316, 2-719. The Appellant does contend however that, in the case at bar, the disclaimer is invalid under V.S.A. tit. 9A §§ 2-719(2),(3). The Hathaway case in no way detracts from this argument.

The Tracy case is likewise inapplicable. The plaintiff there had purchased a two year old used car from the defendants. A month later, he sought to have the car repainted at the defendants cost, complaining that the paint on the car was defective. Although it was not alleged that the defendant was responsible for the defective paint job, the plaintiff contended that the defect constituted a breach of the implied warranty of merchantability. The court found that the defendant dealer's attempted disclaimer of the implied warranty of merchantability did not comply with the statutory requirements of conspicuousness as set out in V.S.A. tit. 9A § 2-316(2), and held it invalid. While the court ultimately held for the defendant, it was on the ground that the merchantability of a two year old car did not depend on the condition of the paint, rather than any finding that the disclaimer was effective.

Once again, Appellant agrees that the Tracy case was correctly decided, but Appellant is at a loss to see how it has any bearing on the case at bar. If this case is merely an extension of the Hathaway rationale, recognizing in general,

the validity of disclaimers, an argument certainly not obvious given the facts of Tracy, Appellant reiterates his contention that this argument is undoubtedly true, but totally irrelevant.

Although Vermont, and all states that have adopted the Code, recognize the validity of disclaimers, they likewise recognize exceptions invalidating disclaimers. In this vein, Appellee has completely failed to respond to Appellant's argument that V.S.A. tit 9A § 2-719(3) does not allow a total exclusion of consequential damages. As stated in Appellant's brief, the text of the final draft of the Uniform Commercial Code § 2-719(3) allowed a limitation or exclusion of consequential damages. The Code, as adopted by the Vermont legislature, only allows a limitation of consequential damages in § 2-719(3).

Vermont is the only state to so vary this section. 2 Anderson, Uniform Commercial Code § 2-719:2, at 503 (2d ed. 1971). Although the Vermont courts have not had the occasion to construe this section, the legislative intent could not be more clear. Given the availability of the allowance of a total exclusion in the Uniform Act, the legislature's refusal to adopt the section as drafted conclusively shows that such a total exclusion is not to be allowed in Vermont. The Hathaway and Tracy cases contain nothing that would lead this court to conclude otherwise.

The Appellees general citation of cases from other jurisdictions is likewise unpersuasive. Ford Motor Co. v. Olive, 234 So. 2d 910 (Miss. 1970), involved a car that was returned to the dealer only when it was being repossessed. There was no evidence in that case that the limited warranty had not been fulfilled.

In Morrison v. Chrysler Corp., 270 F. Supp. 107 (D.S.C. 1967), the car involved had a modified racing engine, and there was, again, no evidence that the limited warranty was breached.

Smith v. Reynolds Metal Co., 323 F. Supp. 196 (M.D. Pa. 1971), did not involve a car at all but, rather, aluminum shingles on the roof of a house. There was no mention in that case of consequential damages and, since the contract price of the roofing job was only $2500, the federal court had no choice but to dismiss the action for failure to meet the jurisdictional amount.

Appellee also cites Price v. Gatlin, 241 Or. 315, 405 P.2d 502 (1965), for the proposition that the courts will not impose liability for consequential economic loss on remote parties. The buyer there had purchased a tractor that he later found to be defective. He sued the wholesaler and the retailer. The court allowed damages against the retailer but not against the wholesaler. The manufacturer was not sued and the court

expressed no opinion on its liability. Once again, the Appellant agrees that the cited case is probably correct, but it is totally irrelevant to the case at bar.

Appellee's assertion that the Appellant was not told that he could not recover, but only that he must sue in a different court, belies the holding of Judge Coffrin below that the Appellant could not recover consequential damages. It is hardly believable that the Appellee is contending that the Appellant could recover consequential damages in a state court. Also, regardless of whether the Appellant was precluded from presenting his evidence below, it cannot be denied that Judge Coffrin ruled that consequential damages could not be recovered.

It would therefore appear that the only directly relevant part of Appellee's brief is its citation of County Asphalt, Inc. v. Lewis Welding & Engineering Corp., 323 F. Supp. 1300 (S.D. N.Y. 1970), aff'd, 444 F.2d 372 (2d Cir.), cert. denied, 404 U.S. 939 (1971). Since this holding is ostensibly Appellee's sole grounds for rebuttal, a clear investigation of the facts of that case would be helpful. The plaintiff therein was a corporation engaged in the production of asphalt. It contracted with the defendant for the purchase and installation of asphalt plants and batch control systems. The work was not done to plaintiff's satisfaction, and it sued

for breach of contract, breach of warranty, negligence and specific performance of the contracts. The defendant counterclaimed for the amount due under the contracts. The jury found for the defendant on its counterclaim in the amount of $226,000. During the trial, the court had ruled that the plaintiff could not recover consequential damages, relying on the express disclaimer of such liability in the contract, in spite of an alleged failure of the limited warranty of repair and replacement.

This case is clearly distinguishable on the facts from the case at bar as the court's preliminary discussion shows. The court stated that:

> the existence of competitior in defendant's industry, and plaintiff's utilization of that fact by procuring alternative contract proposals from defendant's competitors, precludes any argument of unequal bargaining power. There has been no showing that the clauses in question are part of an adhesion form agreed upon by every member of defendant's industry, and even if there had been such a showing, plaintiff would have retained the impressive negotiation power of one prepared to spend approximately one-half million dollars.

323 F. Supp. at 1308. The court further suggested that had the plaintiff desired, he could have negotiated a liquidated

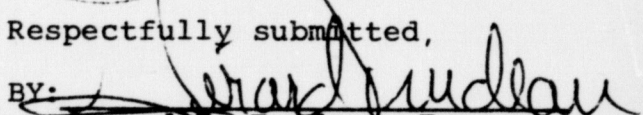
damages provision. It obviously strains credulity to believe that such statement could be made in the case at bar. The exclusion of consequential damages in County Asphalt was clearly a result of negotiation. In the instant case, the Appellant had no voice in shaping such provisions.

The cases cited by Appellant are almost exactly on point, and thus are far more persuasive in the instant case than County Asphalt. These cases represent the emergence of a true implementation of the purposes behind the Uniform Commercial Code. The imprimatur of this court would further those statutory goals and put an end to the powerlessness of the purchaser who "thought he made the best deal."

CONCLUSION:

The Appellant respectfully prays that the court reverse the judgment of the lower court granting the defendants motion to dismiss for failure to meet the requisite amount in controversy and that it remand to the lower court with instructions allowing the Appellant to introduce evidence of his consequential damages.

Respectfully submitted,

BY: 

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February 5, 1975

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Second Circuit
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RE: Richard G. Bolio, Jr., Plaintiff-Appellant V. Ford Motor Company, Defendant-Appellee - Docket No. 74-2173

Dear Mr. Fusaro:

Enclosed find twenty-five (25) copies of Appellant's Reply Brief for filing in the above cause, two (2) copies of same having been sent this date by United States mail to John Dinse, Esq., Dinse, Allen and Erdman, 186 College Street, Burlington, Vermont 05401.

Very truly yours,

Gerard F. Trudeau

GFT:ab
Enclosures
cc: John Dinse, Esq.